

1 UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF NEW JERSEY

3 : CIVIL ACTION NUMBER:  
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IN RE: VALSARTAN PRODUCTS  
LIABILITY LITIGATION

Mitchell H. Cohen Building & U.S. Courthouse  
4th & Cooper Streets  
Camden, New Jersey 08101  
January 24, 2024  
Commencing at 1:03 p.m.

**B E F O R E:**

**THOMAS I. VANASKIE (RET.)  
SPECIAL MASTER**

**A P P E A R A N C E S:**

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**A P P E A R A N C E S (Continued) :**

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**ALSO PRESENT:**

LORETTA SMITH, ESQUIRE  
Judicial Law Clerk to The Honorable Robert B. Kugler  
Larry MacStravic, Courtroom Deputy

1 (PROCEEDINGS held via Teams before SPECIAL MASTER  
2 THOMAS I. VANASKIE at 1:03 p.m.)

3 SPECIAL MASTER VANASKIE: Why don't we get started.  
4 As Mr. MacStravic has informed us, with Teams, people just  
5 show up, so we don't have to worry about admitting anybody.

6 And we're ready to hear argument on the plaintiffs'  
7 fact sheets for the irbesartan and losartan matters.

8 I see Mr. Geoppinger is here.

9 Who will be arguing on behalf of the plaintiffs?

10 You're muted.

11 MR. CRONAN: Your Honor, John Cronan here for the  
12 TPPs. I'll be arguing on behalf of the plaintiffs.

13 SPECIAL MASTER VANASKIE: All right. Thank you.

14 I guess I'll start with a question, Mr. Geoppinger,  
15 why shouldn't I simply follow what I did with respect to the  
16 discovery dispute that was decided back in August of '23 in  
17 Special Master Order Number 82 and then essentially affirmed  
18 by Judge Kugler?

19 MR. GEOPPINGER: Good morning, Your Honor, or good  
20 afternoon.

21 SPECIAL MASTER VANASKIE: Good afternoon.

22 MR. GEOPPINGER: Can you hear me okay?

23 SPECIAL MASTER VANASKIE: Yes, I can hear you fine.  
24 Thanks.

25 MR. GEOPPINGER: Great, great. Thank you. We've had

1 some technical difficulties here this morning. I'm glad I'm  
2 able to be heard.

3 The short answer is, Your Honor, this is a little bit  
4 more -- this dispute here covers a little bit more ground than  
5 what we dealt with back in July and August of last year.

6 Yes, there are some same and similar requests on the  
7 unjust enrichment piece as to the wholesaler defendants that  
8 you may be familiar with and you may have recognized, but  
9 there are other requests here, for example, a large group of  
10 them being requests about, for instance, our innocent -- the  
11 wholesalers' innocent seller defense that weren't at issue in  
12 that dispute that we dealt with back with regard to valsartan  
13 last summer. There's also other requests about other claims.  
14 And with respect to valsartan, we were focusing on unjust  
15 enrichment because that was what was certified.

16 Here with respect to the losartan and irbesartan  
17 cases, the plaintiffs have claims for unjust enrichment  
18 against the defendants who are at issue in this fact sheet.

19 And just to be clear, this fact sheet is for the  
20 third-party payors who have sued with respect to losartan and  
21 irbesartan, and the defendants in those cases are the  
22 wholesaler defendants as well as the manufacturer defendants,  
23 some of the same ones as in valsartan, some different ones,  
24 actually, but not the retailer defendants.

25 So there's some claims here at issue in this fact

1 sheet that weren't at issue with respect to what we talked  
2 about regarding valsartan last summer.

3 SPECIAL MASTER VANASKIE: Are the wholesaler  
4 defendants the only parties on the defense side that have a  
5 dispute with the plaintiffs concerning the fact sheet?

6 MR. GEOPPINGER: The requests are -- there's two  
7 original requests. There are requests that are specific to  
8 the wholesaler defendants and then there's requests that are  
9 more generally applicable to all the defendants.

10 SPECIAL MASTER VANASKIE: Okay. And so at issue now  
11 are only the requests applicable to the wholesaler defendants?

12 MR. GEOPPINGER: I'm prepared to address all the  
13 disputed requests, Your Honor, both those specific to  
14 wholesalers as well as those sort of generally applicable to  
15 all the defendants in the losartan/irbesartan TPP cases.

16 SPECIAL MASTER VANASKIE: Okay. All right.

17 I thought one way to proceed here, I wasn't sure we'd  
18 have to go that route, would be to go request by request. And  
19 maybe that is the best way to go at it.

20 As I understand it from the filing that was made  
21 yesterday, the matters at issue would be highlighted in green,  
22 at least with respect to the submission made yesterday.

23 Is that correct?

24 MR. GEOPPINGER: That's correct, Your Honor. I  
25 think --

1 MR. CRONAN: That's correct.

2 MR. GEOPPINGER: Yeah. Our submission last week  
3 highlighted in green the requests that are in dispute.

4 As an aside, the good news is all the other stuff is  
5 not in dispute. So as you can see, there is a good deal of  
6 information that's not in dispute.

7 SPECIAL MASTER VANASKIE: Right.

8 MR. GEOPPINGER: But the plaintiffs, I believe that  
9 the -- like I said, we've had some technically difficulties,  
10 but I believe their Exhibit B to their filing yesterday is the  
11 same as what we filed with the green highlighting. They added  
12 in some yellow highlighting on things that are not in dispute  
13 but things that were different from valsartan.

14 SPECIAL MASTER VANASKIE: Okay. So let me ask you  
15 this, Mr. Cronan, do you think it's best if we proceed by  
16 disputed request by disputed request, one at a time?

17 MR. CRONAN: Your Honor, I'm open to that approach.

18 If I may be heard as to our general position before  
19 we go forward --

20 SPECIAL MASTER VANASKIE: Sure.

21 MR. CRONAN: -- that would be great.

22 You know, just to briefly lay out here, as outlined  
23 in our letter brief, the TPPs do not deny the fact that  
24 wholesalers are entitled to discovery here.

25 The purpose of a fact sheet is to have a standardized

1 form to allow for the initial disclosure of certain facts to  
2 allow the parties to proceed with formal discovery.

3           The issue we have here is that the fact sheet that's  
4 been proposed goes far beyond what was used in the valsartan  
5 case, and it contains, after several rounds of meet and  
6 confers and exchange of the documents, about seven more sets  
7 of information than the valsartan fact sheet included and  
8 about 28 additional data points. So the TPPs have made  
9 significant concessions since they've received this proposed  
10 fact sheet from the wholesalers; however, the requested  
11 issue are -- there's several problems with them, from our  
12 perspective.

13           First, they're outside the scope of a plaintiffs fact  
14 sheet. They're simply much too broad, they're contention  
15 based in many instances, and they also put the TPPs in a  
16 difficult position because these requests cannot be answered  
17 at this time in large part. They require additional  
18 discovery, and many of them require expert analysis, you know.

19           The appropriate time for these requests, if any, is  
20 to revisit them after the fact sheets have been exchanged,  
21 preliminary information has been exchanged, and the parties  
22 can narrow the issues down.

23           Essentially, Your Honor, we as TPPs are being asked  
24 to prejudge and predict the outcome of the irbesartan and  
25 losartan litigation based on the path that the valsartan

1 litigation has taken, which is really not a fair position for  
2 TPPs to be put in at this time, which is what these -- most of  
3 these requests, if not all of these requests that are at  
4 issue, are doing at this time.

5 SPECIAL MASTER VANASKIE: All right. Well, I still  
6 think we need to go through this one by one. That's my gut  
7 reaction. And --

8 MR. CRONAN: I'm open to that. We're open to that,  
9 Your Honor. That's acceptable.

10 SPECIAL MASTER VANASKIE: I mean, I know it's tedious  
11 and time-consuming, but I think that's the best way to go. I  
12 think that's the best way to go. I'd rather not, but I still  
13 think it's better to do it this way.

14 So why don't we -- and I'm looking at the document  
15 that was filed yesterday, 2611-2. And I just want to look at  
16 the requests that are in green, highlighted in green.

17 And the first one I have appears on page 10. It's  
18 page 11 of the ECF filing, but page 10 of the document itself.  
19 It's heading E, as in Edward, Wholesaler Conduct and Damages.  
20 And it asks for a description with particularity of any  
21 wrongdoing, improper practice or action, and/or  
22 misrepresentation by any wholesaler defendant upon which you  
23 base your claims.

24 Why shouldn't that -- why should that not be part of  
25 core discovery?



1 MR. CRONAN: Your Honor, it's the TPPs' position that  
2 this request goes or this request for information goes beyond  
3 the scope of core discovery precisely because it's a  
4 contention request.

5 This is not a TPP argument sheet or a TPP's  
6 contention sheet. This is a sheet that's intended to get  
7 facts -- basic facts out there that the parties can use for  
8 discovery.

9 This request is asking the TPPs to describe specific  
10 wrongdoing or improper practices or actions, allegations,  
11 essentially, and against the wholesaler defendants and what  
12 their claims are based on.

13 We simply -- it's simply not proper at this stage to  
14 require the parties, the TPPs, to respond to -- this isn't  
15 really a request for facts to begin with. This is a request  
16 for our contentions, which we think is more appropriate, if at  
17 any time, later on in the case.

18 SPECIAL MASTER VANASKIE: Mr. Geoppinger?

19 MR. GEOPPINGER: Well, Your Honor, I think it's  
20 pretty simple. We dispute that, because I think this is a  
21 request for facts. I mean, we're asking -- look, if we made a  
22 misrepresentation, tell us what it is. That is a request for  
23 a fact. The misrepresentation would have already happened.  
24 They filed a lawsuit. They need to prove these kinds of  
25 things, improper practice, misrepresentation. If they're

1 going to proceed and prevail on consumer protection claims, on  
2 unjust enrichment claims, on the claims they have against the  
3 defendants in this case, wholesaler defendants -- this is  
4 about wholesaler defendants, and we'll stick to the wholesaler  
5 defendants on this one. But those are the claims against us  
6 by the TPPs with respect to losartan and irbesartan, along  
7 with implied warranty. And to prevail on those claims,  
8 they're going to have to prove as an element that we engaged  
9 in wrongdoing, that we made a misrepresentation.

10 And asking them to identify the misrepresentation is  
11 an ask for a fact. What is the misrepresentation? Factually  
12 speaking, what in fact did we misrepresent to you?

13 And the next question is after that, what did you do  
14 in reliance upon that? That's another fact. Okay?

15 We made -- you say we made this misrepresentation,  
16 you said you did this. These things would have already  
17 happened. So they're not contentions, they're facts. And as  
18 Mr. Cronan agreed, we're here to get the facts out.

19 So I think that real basic, Your Honor, these are  
20 requests for facts, these are not requests for contention.  
21 None of the things that we've asked for, I believe, are  
22 requests for contention.

23 What we are looking for in this request and the next  
24 request and the one after that and the one we'll talk -- and  
25 all of them that we'll discuss are the facts underlying their

1 claims. That's what we're here to find out. I agree. I  
2 think this does the trick. If we need to -- you know, if  
3 there's a better way to do it, I am open to it, but I think  
4 these are questions about facts, and they should be answered  
5 as such.

6 MR. CRONAN: Your Honor, may I -- may I respond, Your  
7 Honor?

8 SPECIAL MASTER VANASKIE: I do want to hear from you,  
9 yes.

10 MR. CRONAN: To Mr. Geoppinger's response to that, I  
11 will add that the TPP fact sheet here on page 13 of the ECF  
12 filing that you're referring to contains a specific section  
13 under Category 4 that says Fraud Claims. I'll direct to your  
14 attention to that.

15 And it begins with asking the TPPs, are you claiming  
16 fraud or consumer fraud in this action on the basis of  
17 plaintiff-specific allegations.

18 And it goes on to ask, what representations do you  
19 claim was falsely or fraudulently made, to whom it was made,  
20 by whom, how was it made, when was it made, were they in  
21 writing.

22 These are factual items. This is what  
23 Mr. Geoppinger's referring to presumably, but the request at  
24 issue under wholesaler conduct and damages is much different  
25 than this, Your Honor. This is why we consider this to be a

1 contention request. It's not proper. It does not go to the  
2 specific facts that Mr. Geoppinger's asserting that the  
3 wholesalers are looking for at this time.

4 SPECIAL MASTER VANASKIE: All right. Let's hear from  
5 Jeff in reply to this.

6 Because you do have that whole section on fraud  
7 claims that is not objected to.

8 Why isn't what you're seeking under subheading E in  
9 parts I, II and III cumulative or duplicative?

10 MR. GEOPPINGER: The most simple answer to that, Your  
11 Honor, is that there, you know, aren't going to be any fraud  
12 claims against the wholesaler defendants. They were dismissed  
13 in valsartan. I anticipate there will be a stipulation that  
14 was referenced in our brief that we're working on with the  
15 plaintiffs that will essentially have the same claims that are  
16 in losartan and irbesartan dismissed that were -- without  
17 prejudice that were dismissed in the valsartan case.

18 So, you know, the easy answer here, you know, from  
19 the wholesalers' perspective, which is what section E is  
20 about, the wholesalers, is there aren't any fraud claims. The  
21 claims against us are consumer protection, there -- like I  
22 said, unjust enrichment.

23 So the kind of conduct that -- the plaintiffs have to  
24 prove conduct, for instance, on it, as we discussed back in  
25 the summer, on an unjust enrichment claim.

1           To get to liability, they have to prove in some  
2 places wrongdoing by the defendants. Texas and Indiana come  
3 to mind. So the wholesalers in these requests are looking for  
4 that kind of information. They're looking for the facts upon  
5 which the plaintiffs are going to claim that we, you know,  
6 committed wrongful conduct. We're looking for the facts upon  
7 which they're going to claim that our conduct was -- in the  
8 context of a consumer protection claim was either unfair or --  
9 I'm forgetting the other term. But that's the kind of  
10 information we're seeking here separate and apart from a fraud  
11 claim.

12           And, you know, I will just point out, Your Honor, the  
13 plaintiffs recently filed motions for summary judgment in  
14 valsartan. And one of the things they moved for summary  
15 judgment on is their consumer protection claim. And that's  
16 against, of course, the defendants in that case.

17           And they filed a motion for summary judgment. And  
18 per the local rules, they attached a statement of material  
19 facts that supports their request for judgment as a matter of  
20 law on a consumer protection claim. And they attached a  
21 statement of material facts to support their argument that the  
22 Court can determine on summary judgment that those defendants'  
23 conduct was unfair.

24           Essentially what we're asking for here in this fact  
25 sheet, Your Honor, are those facts, those facts that we would

1 see ultimately possibly in a statement of material facts that  
2 the plaintiffs would submit in support of a summary judgment.  
3 But we don't want to wait till we get to summary judgment to  
4 find out what they are, Your Honor. We're entitled to find  
5 out now.

6 And if they don't have them now, they can say they  
7 don't. If they get them later, they can amend under the rules  
8 and add to it.

9 But certainly we don't want to be in a position where  
10 the facts that the plaintiffs might use to support a claim  
11 against us, consumer protection, for example, would be listed  
12 in a statement of material facts but somehow we weren't able  
13 to get them in discovery.

14 So what we're trying to do here with these questions,  
15 Your Honor, is get those facts now via the fact sheet, which,  
16 yes, it's more -- it's more voluminous than what was done in  
17 valsartan, but as you'll recall, we had a couple hearings back  
18 in August and September about that very issue, and this is how  
19 we decided to proceed. And the defendants have endeavored to  
20 create a fact sheet that, yes, is a little more substantive,  
21 but in the interest of using the fact sheet as the plaintiffs  
22 asked us to do, and in the interest of getting this  
23 information now, not later, and not being in a position,  
24 candidly, Your Honor, where we have to fight about waiver and  
25 those kinds of things that we've had to deal with before.

1           We don't need -- if we don't need to kick the can  
2 down the road, let's not do it. Let's put it here, and let's  
3 deal with it now.

4           SPECIAL MASTER VANASKIE: Mr. Cronan, why couldn't  
5 you answer now, the question of to describe with particularity  
6 any wrongdoing, improper practice, or action, and/or  
7 misrepresentation by any wholesaler defendant upon which you  
8 base your claims?

9           MR. CRONAN: Your Honor, I would say it would be  
10 incredibly difficult for TPPs to answer that now, because what  
11 we could answer is what we've agreed to on page 13 of these  
12 proposed -- this exhibit here, because those relate to  
13 specific facts.

14           The issue here is that we're not kicking the can down  
15 the road. We're doing how things -- we're doing this in the  
16 normal fashion of how it's ordinarily done, is to get --  
17 establish basic facts and then move on to additional  
18 discovery.

19           You know, I want to add that the facts in the summary  
20 judgment motion that Attorney Geoppinger was mentioning, those  
21 were developed after discovery, in discovery, basically  
22 following depositions in a much different posture than what  
23 we're dealing with now.

24           So I just think it's -- it would not be appropriate  
25 to have multiple requests that TPPs cannot respond to, to

1 simply have them state, we can't respond, we need to  
2 supplement later, when that could be maybe used against us at  
3 some point in the future, when we don't -- it's not a  
4 constructive use of a fact sheet, Your Honor. It's simply --  
5 is seeking information that is contention based.

6 And I think that what's missed here is that a  
7 contention can be couched as fact. And that's exactly what's  
8 going on in this situation here.

9 So we would say that this is -- this is a different  
10 situation. We're supposed to be getting preliminary facts  
11 now, and this question goes far beyond what's appropriate for  
12 a fact sheet.

13 SPECIAL MASTER VANASKIE: All right. Thank you.

14 I'm going to move now to page 14 of 2611-2. And  
15 there's one item that's in dispute there, that the  
16 plaintiff -- plaintiffs, the TPPs, have not agreed to produce,  
17 and that is the gross revenue, expenses and/or costs, and net  
18 profits to you on each claim.

19 So what's objectionable about that?

20 MR. CRONAN: Your Honor, that request is one of -- I  
21 would add, to begin with -- 29 subpoints of data that TPPs  
22 have agreed to that were not in the valsartan fact sheet, just  
23 to set the stage on this one.

24 SPECIAL MASTER VANASKIE: All right.

25 MR. CRONAN: That information there --



1           SPECIAL MASTER VANASKIE: You've agreed to produce 28  
2 of those subsets, do I understand that right?

3           MR. CRONAN: That's correct, Your Honor. Following  
4 several meet and confers and exchanging this document, we have  
5 agreed to that in good faith.

6           SPECIAL MASTER VANASKIE: Okay. All right.

7           MR. CRONAN: But these -- this particular item we're  
8 focused on, Your Honor, that deals with gross revenue,  
9 expenses or costs and net profits, we, TPPs, are not in a  
10 position to answer this now until we have additional discovery  
11 and the use of expert disclosures.

12           Once experts are available to review this and we have  
13 disclosures made, at the appropriate time down the road, we'll  
14 be in a position to deal with this.

15           We don't have any issue with this similar request  
16 being presented after the close or the conclusion of the fact  
17 sheet process. But again, this is far beyond what's  
18 appropriate early on at this stage.

19           So this is the kind of thing that's really not  
20 appropriate because we're unable to answer at this time as  
21 TPPs. It's not a factual matter.

22           SPECIAL MASTER VANASKIE: Why not respond that way?  
23 You know, instead of getting into a battle over what's  
24 appropriate to ask now, why not have you be required to  
25 respond in whatever way you can, which -- and one possible

1 response would be, it's premature, we can't answer it right  
2 now?

3 MR. CRONAN: Your Honor, we could do that, but my  
4 concern is that if we have that -- if we have multiple  
5 requests that go that route, we're left with a situation where  
6 we're wasting time and we're not focusing on what's typically  
7 asked.

8 I think there -- I think when we're met with a  
9 situation where we're facing a request that would be met with,  
10 we can't answer, we'll have to supplement, I think the issue  
11 is that that's the test of whether something is appropriate or  
12 not in the fact sheet stage. You know, the fact sheet stage  
13 should set the stage for basic information. And this is the  
14 kind of stuff that really ought to happen later in the case,  
15 if at all, once we have more information on experts.

16 I just think it's not a good use of people's time to  
17 answer, we don't know now but we'll tell you later. I think  
18 it should be revisited at the appropriate time.

19 SPECIAL MASTER VANASKIE: Mr. Geoppinger, do you want  
20 to respond?

21 MR. GEOPPINGER: Yes, Your Honor.

22 You know, this request here, we understand that it  
23 may involve some expert work, and we're certainly willing to  
24 accept that and accept the answer if that's where it has to  
25 come from via that route.

1           However, to your point, I mean, it is something that  
2 can be answered now at least with respect to that answer, to  
3 finding that out. The plaintiffs want -- need to go through  
4 that exercise, as opposed to having that figure available to  
5 them that they can just write -- that they can provide in the  
6 data we've asked for. And I will note there's probably a  
7 request a little bit later on that also addresses this.

8           But if they're willing to do that and they can  
9 provide it via experts, we can accept that; but to the  
10 point -- your point that, you know, or the point that it  
11 doesn't belong in a fact sheet, I mean, we're trying to be  
12 comprehensive here more so than in valsartan. We're trying to  
13 get the discovery out there now. We're trying to avoid -- all  
14 of this was discussed back in August and September. We're  
15 trying to avoid these waiver issues.

16           And so, you know, the rules certainly provide that  
17 the plaintiffs can provide an answer now and they can  
18 supplement it later. So I think that the idea we should just  
19 take it out because we can go -- somewhere down the road,  
20 we'll get to it later, you know, obviously causes concern for  
21 the defendants. And I don't see any reason why we need to do  
22 that. We can leave it here, and we can deal with it now. And  
23 if it needs to be supplemented later, then that's what will  
24 have to happen.

25           MR. KASS: Your Honor, may be I heard?

1 SPECIAL MASTER VANASKIE: Yes, certainly.

2 MR. KASS: Zalman Kass, also on behalf of the TPP  
3 plaintiffs.

4 There is one other additional issue with these three  
5 requests, is that they're really focused on the benefit to the  
6 TPPs. And, Your Honor, this is unjust enrichment, which Your  
7 Honor readily rejected in valsartan. We're not supposed to be  
8 focusing on any value to the TPPs. Unjust enrichment focus on  
9 the value and/or the gain to the defendant in this case, which  
10 is the wholesaler defendant.

11 This is another instance where -- you know, in  
12 addition to all the reasons that Mr. Cronan mentioned, there's  
13 an additional reason why it's improper, is because, again,  
14 we're focusing on the wrong conduct. And Your Honor already  
15 excluded this in valsartan.

16 SPECIAL MASTER VANASKIE: Okay. Thank you.

17 Any response on that?

18 MR. GEOPPINGER: Sure, Your Honor.

19 With respect to the conduct question, you know,  
20 candidly, to say that we only focus on the conduct of the  
21 defendants is a misstatement of law. All right?

22 The *McCormick* case we cited in our letter, we it  
23 cited multiple times. It's from 2019 from District of  
24 Columbia. UE requires a fact-intensive inquiry that focuses  
25 on the totality of the circumstances, not just on the

1 defendants' conduct.

2           The defendants' conduct or the focus on defendants  
3 might be of interest for a damages calculation, but we have to  
4 get past liability before we get to damages. And in unjust  
5 enrichment, okay, the third element is that the defendants'  
6 acceptance of the benefit under the circumstances -- under the  
7 circumstances, that's the keywords -- under the circumstances  
8 that make it unfair for the defendant to keep the benefit or  
9 part of it.

10           The circumstances are not just what the defendants'  
11 conduct is. To get to liability, we look at the totality of  
12 the conduct, totality of the circumstances, both with respect  
13 to the defendants and with respect to the plaintiffs.

14           Think about it this way: In an unjust enrichment  
15 claim, would it be fair -- because unjust enrichment is an  
16 equitable claim. The element I just read to you uses the word  
17 "unfair." Would it be fair for the TPP plaintiffs to be able  
18 to recover a wholesaler defendant's profits when the TPP  
19 plaintiffs may have profited from the covering of the claims  
20 to a greater extent than the wholesaler defendants did from  
21 distributing the product? That would be a jury question. And  
22 that would be a jury question to determine liability.

23           Therefore, the wholesalers in that instance should be  
24 able to obtain discovery as to the benefits and as to the  
25 conduct of the TPP plaintiffs. It's not just focused on us.

1 I'll also add to that, Your Honor, a reference back  
2 to that motion for summary judgment that was just filed in  
3 valsartan on the consumer protection claim. It's on page 31  
4 of their motion.

5 The plaintiffs argue that -- and I'm just going to --  
6 I'll just quote it for Your Honor. It says in *F.T.C. v.*  
7 *Wyndham*, the Third Circuit was tasked with interpreting the  
8 unfairness -- there's that word again -- prong of the FTC Act.  
9 In doing so, the Court used the FTC's 1980 policy statement on  
10 unfairness as its guide. This is the policy that the  
11 plaintiffs are advocating that the Court use in this case on  
12 summary judgment in valsartan.

13 The Court described the three factor unfairness test:  
14 One, the substantiality of the injury; two, whether it, the  
15 substantiality of the injury, was outweighed by any  
16 countervailing benefits. That's the key element, Your Honor,  
17 countervailing benefits. That means countervailing benefits  
18 to the TPPs. And in their summary judgment motion, they argue  
19 that they didn't get any benefits.

20 But regardless of what they argue in that motion in  
21 valsartan, it's clear that on consumer protection claims, the  
22 benefits to the TPPs are also at issue.

23 And of course, CMO or SMO 82 didn't address a  
24 consumer protection claim at all. It focused solely on the  
25 unjust enrichment claims.

1           So I would suggest that there are two reasons on both  
2 claims that the wholesaler defendants should be entitled to  
3 discovery as to the conduct of the TPP plaintiffs as well as  
4 the benefits that they realized from their covering the claims  
5 at issue.

6           SPECIAL MASTER VANASKIE: Thank you.

7           Mr. Cronan or Mr. Kass?

8           MR. KASS: Sure.

9           Your Honor, I just want to say briefly -- and I'm not  
10 going to address all the arguments and all the citations that  
11 Mr. Geoppinger was going through, because the reality is, the  
12 Court has heard this argument, the same argument, many times,  
13 has ruled on it, has -- the exact same cases they're citing  
14 now, the Court rejected, Your Honor rejected, and Judge Kugler  
15 reaffirmed it.

16           Your Honor, I don't want to waste more -- or use up  
17 more of the times going over the same argument, but this is,  
18 you know, water over -- we've already passed this.

19           So, Your Honor, just to relitigate this, I mean, the  
20 orders are what they are, and we just respectfully ask the  
21 Court to, you know -- you know, it's already been decided like  
22 that.

23           I'll leave it at that.

24           SPECIAL MASTER VANASKIE: All right. Thank you.

25           MR. CRONAN: Your Honor, if I may add one thing, just

1 to echo what Mr. Kass said.

2 SPECIAL MASTER VANASKIE: Sure, Mr. Cronan.

3 MR. CRONAN: As this Court -- as Your Honor found in  
4 Special Master Order 82 and as Judge Kugler ordered in the  
5 order affirming that, whether the TPPs profited by fulfilling  
6 their contractual obligations by paying for worthless VCDs is  
7 irrelevant to whether wholesalers were unjustly enriched.  
8 That is exactly what Special Master Order 82 says.

9 The TPPs, by paying for the contaminated VCDs to  
10 fulfill their duties, are not sellers of the contaminated  
11 product. Any profits by honoring their contractual  
12 obligations are irrelevant to a claim for unjust enrichment,  
13 Your Honor.

14 So echoing what Attorney Kass said, this is just  
15 water under the bridge at this point, and we think it's well  
16 established what the outcome should be here, respectfully.

17 SPECIAL MASTER VANASKIE: All right. Thank you.

18 I'm going to move now to page 16 of Document 2611-2.  
19 It's request 13, documents sufficient to show that you were a  
20 third-party beneficiary to any contract and/or agreement with  
21 each manufacturer defendant, wholesaler defendant, and/or  
22 pharmacy benefit manager.

23 Why is that improper?

24 MR. CRONAN: Your Honor, the TPP fact sheet contains  
25 requests for information and documents on contracts with



1 wholesalers and defendants. This question as to whether TPPs  
2 were a third-party beneficiary to a contract is a contention  
3 request in our view, and secondarily, it's improper for a  
4 plaintiffs fact sheet at this early stage.

5 It requests TPPs to guess and to predict what  
6 discovery is going to show at this point. And we don't have  
7 the ability really to answer this information as we typically  
8 would with an actual, a straightforward request for facts.

9 So, again, like the prior request, we think it's too  
10 early for this kind of request, and we think it's outside the  
11 scope of what would be allowed in a typical plaintiff fact  
12 sheet and the kind of plaintiff fact sheet that was used in  
13 the valsartan case with success.

14 SPECIAL MASTER VANASKIE: All right. Mr. Geoppinger?

15 MR. GEOPPINGER: Your Honor, we think this asks for  
16 relevant documents. It's not asking for anybody's contention  
17 about anything.

18 The fact of the matter is this: You know, in this  
19 fact sheet, they have -- the plaintiffs have agreed to produce  
20 contracts with manufacturers, wholesalers, retailers,  
21 third-party -- PBMs, which is great. That's great. And we  
22 are very glad about that.

23 But the fact of the matter is, and we discussed this  
24 back in the summer, the way this whole industry works and the  
25 whole insurance payment system works, it doesn't involve the

1 wholesalers and -- my clients. We don't have dealings with  
2 these third-party payors, to our knowledge. So I expect  
3 they're not going to have any contracts.

4 So the question is this: If you don't have any  
5 contracts, are you claiming you're a third-party beneficiary  
6 to some other contract? And if so, do you have a document to  
7 support that? And that's all we're asking here. And that's  
8 what we'd --

9 SPECIAL MASTER VANASKIE: But it sounds like --  
10 sounds like a contention question, do you contend that you're  
11 a third-party beneficiary to any contract.

12 MR. GEOPPINGER: Well, we ask -- actually, it's in  
13 the context of a request for production, which is how we use  
14 these fact sheets. And I won't belabor the point here. The  
15 Court is well aware of the arguments about the  
16 interrogatories. So we have requests for production here --

17 SPECIAL MASTER VANASKIE: Right.

18 MR. GEOPPINGER: -- seeking facts that may be  
19 contained in documents.

20 And essentially, if the plaintiffs -- I mean, if --  
21 they either have -- they can give us their contracts. If they  
22 don't have contracts, we won't get them. They can give us  
23 documents, which -- in response to this, which we -- they will  
24 say is, you know, is evidence of a third-party beneficiary  
25 relationship. That's all we're asking for.

1           If they get a document that they're going to put  
2 on -- they're going to cite to in a statement of material  
3 facts with respect to one of their claims someday, this would  
4 be the time to give it to us, and this is the request for it.

5           SPECIAL MASTER VANASKIE: The plaintiffs have cited  
6 some case law that essentially says requests for production  
7 cannot be used to ferret out contentions.

8           Why should I not interpret certain of these requests  
9 as essentially contention interrogatories in disguise and say  
10 they're not part of core discovery, that can come later?

11           MR. GEOPPINGER: Well, because they're asking for  
12 facts and they're asking for documents or they're asking for  
13 documents that contain the facts, but they're fact-specific.  
14 I mean, if the plaintiffs have a document that they -- that  
15 shows a third-party beneficiary relationship responsive to  
16 this, they can produce it. If they don't have a document,  
17 they won't.

18           But via these discovery requests -- these requests in  
19 whatever form they are in this fact sheet, which is, as I  
20 mentioned, consistent with the way the fact sheets have had to  
21 have been done before and consistent with the fact that Judge  
22 Schneider didn't allow any interrogatories -- and as far as I  
23 know, we're still not allowed to serve any interrogatories.  
24 But if the Court wants to advise me otherwise, I'll be happy  
25 to hear it and to adjust accordingly. But I think that what

1 we are asking for is a production of a document. Factually  
2 speaking, do you have it, do you not have it, end of story.

3 And I think that's what all of these requests are  
4 aimed at, finding the facts or finding the documents  
5 containing the facts that underlie the plaintiffs' claims,  
6 that underlie the elements they have to produce -- or excuse  
7 me, the elements they have to prove.

8 SPECIAL MASTER VANASKIE: All right. And your  
9 response?

10 MR. CRONAN: Yes, Your Honor.

11 As you indicated before, and as the plaintiffs have  
12 outlined in their letter brief, Rule 34, unlike Rule 33, has a  
13 blanket prohibition, as far as we see, on contention requests  
14 for production of documents. So that's a major roadblock here  
15 to this request, this proposed request.

16 And the fact that it says -- it's -- Attorney  
17 Geoppinger's asserting that it's searching for facts, any  
18 contention can be couched as a fact, which is exactly what  
19 this is. As Your Honor said earlier, it ought to say -- it  
20 may as well state, do you contend that you were a third-party  
21 beneficiary.

22 TPPs have agreed to include requests for information  
23 regarding whether they had a contract with any manufacturer  
24 defendant or wholesaler defendants related to the losartan or  
25 irbesartan. That is a more straightforward question. That's

1 more appropriate for a fact sheet, Your Honor.

2 So we'll just leave it at that and indicate that this  
3 is outside the scope of what's permissible, both in a fact  
4 sheet and both from a contention request for production.

5 SPECIAL MASTER VANASKIE: All right. Thank you.

6 Now, requests 19 through 33 have all been objected  
7 to.

8 Mr. Cronan, do you want to elaborate on your  
9 objections to any or all of those requests?

10 MR. CRONAN: Yes, Your Honor. I think that these  
11 simply -- this is further -- the issue that we've flagged  
12 before is even more pronounced with respect to these requests.  
13 These are clearly contention requests for production of  
14 documents in our perspective the further down we move.

15 For example, request number 20 that's been  
16 highlighted, all documents that refer/relate to any  
17 unconscionable commercial practice, deception, fraud, false  
18 pretense, false promise, misrepresentation, omission or  
19 concealment. This is not a search for facts, certainly not  
20 the kind of facts that one would expect to see in a plaintiffs  
21 fact sheet in a case like this.

22 If these requests are the kind that wholesalers or  
23 defendants wish to renew at a later time, you know, we can  
24 certainly revisit it at that time, but it's certainly not  
25 appropriate at this stage.

1           Your Honor, I think they're clearly contention  
2 requests on their face, so they ought to be prohibited all  
3 together, in fact, based upon the mandate in Rule 34.

4           SPECIAL MASTER VANASKIE: I'm sensitive to  
5 Mr. Geoppinger's concern about waiver and not being able to  
6 seek discovery that is believed to be necessary to adequately  
7 prepare a defense.

8           So what would be improper about -- now, I know -- I  
9 know, you know, there was a ruling in this matter, no  
10 interrogatories.

11           But what would be improper about saying after core  
12 discovery is completed, the defense can propound  
13 interrogatories, including contention interrogatories?

14           MR. CRONAN: Your Honor, our position is that after  
15 the fact sheet process is completed, we are open to additional  
16 discovery as needed, depending upon what the issues look like  
17 and how the issues are narrowed.

18           I don't have a crystal ball, as speaking on behalf of  
19 the TPPs, in terms of exactly what requests Mr. Geoppinger or  
20 the wholesalers or defendants would present, but we are open  
21 to additional discovery as allowed by Rule 26 once the basic  
22 facts are elicited.

23           But again, we do not think that this is the  
24 appropriate time and certainly not when it's couched as a  
25 request for production in this manner.

1           SPECIAL MASTER VANASKIE: All right. Mr. Geoppinger,  
2 why don't we proceed along those lines and establish now that  
3 you can pursue discovery by way of contention interrogatories  
4 after core discovery is completed?

5           MR. GEOPPINGER: Your Honor, that's -- you know, as  
6 we mentioned in our letter, we're here for -- you know, we're  
7 more substance over form, Your Honor. We just want to get the  
8 information.

9           SPECIAL MASTER VANASKIE: All right. Okay.

10          MR. GEOPPINGER: So, yeah, I mean, look, I won't  
11 belabor the point. We're trying to track the elements here of  
12 their claims in these requests. We're using the requests  
13 because of the interrogatory ruling.

14          But the wholesaler defendants are certainly open  
15 to -- with respect to these specific wholesaler requests, and  
16 I imagine the other defendants will tell me if I'm wrong, but  
17 with respect to other ones that the Court feels appropriate,  
18 that might be more generally applicable to the defendants in  
19 this case. So yeah, let's come up with a -- you know, I guess  
20 a plan for the defendants to get this information.

21          And, if -- look, if after having received responses  
22 to the information that we've either agreed to or that the  
23 Court decides is an appropriate request in this fact sheet, we  
24 narrow that issue, then great. That's fine. But like I said,  
25 we're looking for a vehicle by which we can get this

1 information.

2 And if the Court wants to, in ruling upon these  
3 disputed requests, say, look, we're going to do this fact  
4 sheet, this is what it's going to look like. And then after  
5 that, at this point in time, 30 days after, 60 days after, put  
6 it in an order, and provide that this is going to happen, the  
7 wholesaler defendants -- and I expect all the defendants in  
8 these losartan/irbesartan cases brought by the TPPs would  
9 be -- would be fine with that.

10 SPECIAL MASTER VANASKIE: All right. Thank you.

11 I'm now looking at requests 37, 38, 40 through 46.

12 And again, they seem to be outside what I conceive to  
13 be core discovery. But on the other hand, they seem to be  
14 inquiries that could be relevant, depending upon what's  
15 produced in core discovery.

16 What's your position, Mr. Cronan?

17 MR. CRONAN: Your Honor, I am open to -- I would  
18 agree with that generally. I'd say that these are certainly  
19 outside the scope of what's appropriate in core discovery, and  
20 as TPPs, we are -- I believe I speak on behalf of all TPPs  
21 when I say we're open to revisiting the issue depending upon  
22 what information defendants think they might need after we  
23 exchange the basic information in an appropriate fact sheet.

24 So I think that's the best way to do it. I think  
25 it's much too early to deal with anything like this at this



1 point.

2 But I will say, Your Honor, that if this does happen  
3 in this manner, we reserve all rights, including any arguments  
4 we may make about Rule 34 requests for production as  
5 contention requests, which we think are off limits.

6 SPECIAL MASTER VANASKIE: Right.

7 MR. CRONAN: But generally -- so that's our position  
8 on that piece.

9 SPECIAL MASTER VANASKIE: Okay. I don't want anybody  
10 to waive any positions here, so I'm very sensitive to that.

11 I want to study this a little more closely, but I'm  
12 inclined to say, the items that are agreed to thus far should  
13 go into the fact sheet, the plaintiffs fact sheet. And we can  
14 talk about the time frame within which the fact sheets need to  
15 be produced.

16 And then the other items -- I know I'm kicking the  
17 can down the road, and I want to be very careful of -- not to  
18 do that unnecessarily, but it might be appropriate to say  
19 let's get the core discovery done, then let's allow additional  
20 discovery.

21 I'm not a fan of contention interrogatories. I  
22 understand -- I understand that, but it might be appropriate  
23 in this matter to allow for some contention interrogatories.

24 The problem I have with contention interrogatories is  
25 that they're never really answered. They really don't provide

1 discovery. And they're often an attempt at a gotcha. So I'm  
2 trying to balance that out.

3 MR. CRONAN: Your Honor, may I add one thing for you?

4 SPECIAL MASTER VANASKIE: Absolutely.

5 MR. CRONAN: Your Honor, just to be clear for the  
6 record, that the TPPs, we are not opposed to deferring  
7 requests, but we are reserving any objection to contention  
8 interrogatories.

9 And the way the case has proceeded over the last few  
10 years, we've generally had the understanding and everyone has  
11 taken the approach that there have not been any  
12 interrogatories.

13 So, again, we're okay with deferring requests, but,  
14 you know, any and all objections to those type of  
15 interrogatories are reserved by TPPs in that event.

16 SPECIAL MASTER VANASKIE: All right.

17 MR. GEOPPINGER: And, Your Honor --

18 SPECIAL MASTER VANASKIE: Yes.

19 MR. GEOPPINGER: -- with respect to all of these --  
20 and actually, I'm just going to -- I'd like to talk about 41  
21 to 46, if I could, separately after I make this statement.

22 SPECIAL MASTER VANASKIE: We will. Okay.

23 MR. GEOPPINGER: Those are a little bit different.

24 But, you know, the plaintiffs are here saying these  
25 are contention interrogatories, they're contention requests

1 for production or contention whatever they are. To be clear,  
2 we don't think they are. We think they're looking for facts.  
3 Okay? And we're looking for facts the best we can in the  
4 means that the Court has previously approved and the fact  
5 sheets that they've used and trying to basically do what we  
6 understand the plaintiffs have asked for and the Court accepts  
7 as a way to go about this.

8 As I noted, we're open to getting through the fact  
9 sheet on what we've agreed to, whatever else the Court finds  
10 to be -- should be included from these disputed requests, and  
11 then dealing with the ones that the Court doesn't include at a  
12 later time, even via interrogatory, that's great. I don't  
13 necessarily say we're going to serve contention  
14 interrogatories. I doubt we will. Maybe they will be as  
15 simple as tell me all the facts that you would include in a  
16 statement of facts to support your claim that, you know --  
17 that you're entitled to -- excuse me, that the defendants'  
18 conduct was such that we're liable for unjust enrichment or  
19 that the defendants' conduct was unfair such that we're liable  
20 for consumer protection, you know, statute violation.

21 I'm not necessarily looking to serve contention  
22 interrogatories, Your Honor. I don't necessarily think I  
23 have. But if the Court is willing to defer this and come up  
24 with a better way to do it, we're all for that.

25 And as I noted, once we get the other information,

1 perhaps our requests will be narrowed and we'll be in a little  
2 bit different position.

3 But I don't think the Court should expect, the TPPs  
4 should expect or assume that there are going to be contention  
5 interrogatories coming out of us. We think we're just looking  
6 for facts, and that's all we're going to keep doing if we  
7 don't have them.

8 With respect to 41, I think it is, to 46, Your  
9 Honor -- I want to make sure we get those numbers right,  
10 yeah -- those -- those are a little bit different from our  
11 perspective.

12 What we're trying to do there, Your Honor, for the  
13 wholesalers is ask for documents containing facts that relate  
14 to our innocent seller defense.

15 An innocent seller defense is something that came up  
16 early in the litigation. It's been deferred to summary  
17 judgment by the Court. It's a defense available to suppliers  
18 like ourselves in many, many states. And it's basically  
19 designed, Your Honor, to protect distributors who are really  
20 conduits of products like the wholesaler defendants in this  
21 case.

22 So generally those defenses exclude a supplier from  
23 liability unless certain circumstances exist, like -- and I'm  
24 kind of -- there's a lot of different statutes, so I'm putting  
25 some of this stuff together. But basically circumstances

1 where perhaps the manufacturer owns the distributor or the  
2 distributor owns the manufacturer, or one in particular that I  
3 think we address in request 45, if the supplier markets the  
4 product under its own label.

5 Of course that didn't happen here, but to the extent  
6 we are going to be asserting that defense on summary judgment  
7 and we come in and say, you know, we didn't market it under  
8 our own label, you can't get around the innocent seller  
9 statute in this state because of that, we are asking the TPPs,  
10 hey, do you have any information or do you have documents in  
11 your possession that contradicts that.

12 And I think that's something we're allowed to take  
13 discovery on. I don't think there's anything contention --  
14 contentious about that. And I would suggest that we could  
15 include them here in this -- in this fact sheet.

16 It is certainly a defense that will be asserted.  
17 It's something we've raised from the outset of the litigation  
18 to I think to the surprise of no one, and I think these  
19 requests are basically, hey, look, do you have something in  
20 your possession document wise that would include facts that  
21 would tend to prove one of these exceptions.

22 I think the answer is going to be, you know, no, but  
23 if it's not, then we'll know what those documents are.

24 SPECIAL MASTER VANASKIE: Mr. Cronan, what  
25 Mr. Geoppinger is saying seems to make sense to me, that core

1 discovery should include the innocent seller defense. And  
2 they're looking for documents that would be relevant to that  
3 defense.

4 Why not allow that to go forward?

5 MR. CRONAN: Yes, Your Honor. Thank you for the  
6 opportunity to weigh in on that.

7 We would echo some of the prior comments we've made  
8 in the past, particularly many of the documents which are at  
9 issue here that are requested that are likely to inform us of  
10 the response or to be responsive, for that matter, frankly,  
11 are in the defendants' hands in some cases.

12 In terms of the information on knowledge of a  
13 wholesaler defendant, for example, other issues regarding the  
14 value provided or I should say the involvement or control  
15 that's alleged on behalf of a wholesaler defendant, this isn't  
16 the type of stuff that -- again, that's not part -- it's just  
17 ordinarily not part of a fact sheet. It's not basic facts.

18 I understand they're raising a defense, Your Honor,  
19 and there's been reference to, you know, anticipated summary  
20 judgment motions and whatnot. But we're far from that, Your  
21 Honor. And this is putting the cart before the horse in our  
22 view. It's simply not appropriate for this early stage and  
23 the basic information we're looking to gather.

24 SPECIAL MASTER VANASKIE: Well, why wouldn't it be  
25 appropriate simply to say, discovery is ongoing, we don't have

1 any documents at this time, but include it as part of the fact  
2 sheet?

3 MR. CRONAN: I think for the -- Zalman, do you have  
4 something to add?

5 MR. KASS: Well, yes, Your Honor. If I could add to  
6 that.

7 SPECIAL MASTER VANASKIE: Sure.

8 MR. KASS: We still take issue, because these are  
9 contention requests for production of documents. They're not  
10 simply saying -- a regular request for documents is like all  
11 documents between this person and that person, that date,  
12 maybe referencing something. That's a request for production  
13 of documents. But when you're taking the elements of a  
14 defense and saying all documents that would support or negate  
15 this defense, now me as an attorney, I have to analyze the  
16 documents, determine whether they do support the defense, they  
17 do negate the defense, identify those documents and produce it  
18 to the opposing side.

19 Your Honor, that's not permitted under the Rules of  
20 Federal Procedure, for the simple basis, it's forcing me to do  
21 attorney work product. Right? And then give my work product  
22 to the other side, Your Honor.

23 So if they can make these factually based, right, all  
24 documents, whatever, something like that where they're not  
25 taking the elements and asking me to apply facts to elements.

1 That's what a contention is.

2 And you can say it's only -- I'm only looking for a  
3 fact, I'm only looking for fact, but when you're asking to  
4 apply those facts to an element of a claim or a defense, that  
5 is contention based, and that's simply not permitted by the  
6 rules. So I just wanted to make that clear.

7 MS. DAVIS: Your Honor, D'Lesli Davis from McKesson.  
8 May I be heard on this for just a moment?

9 SPECIAL MASTER VANASKIE: Yes, you may.

10 MS. DAVIS: I represent McKesson, which is a  
11 wholesaler.

12 These are pleading obligations of the plaintiffs.  
13 They are to allege facts that meet the elements of particular  
14 claims and conclude that they have been damaged in some way  
15 and then articulate those damages.

16 They have not made those allegations in any of their  
17 complaints. We are on zero notice of -- using the great  
18 example that Mr. Geoppinger was using -- what a  
19 misrepresentation was factually, who made it, what the date of  
20 it was, when it happened, or how they relied on it, what the  
21 date of reliance was, who relied, in what way they relied.  
22 They have not even articulated whether they know if an  
23 individual wholesaler was involved in any given transaction.  
24 And they have successfully dodged that, having to ever do  
25 that, having to ever plead or do discovery on facts that would



1 constitute elements.

2           This is a red herring to say that these are  
3 contention RFPs or if you interpret them as interrogatories.  
4 The request is for what the facts they base these claims on  
5 are. And they owe us that at some point. I'm sympathetic, as  
6 Mr. Geoppinger suggested, if there's a different time that the  
7 Court wants to do it or a different manner, but what we need  
8 to know is that we're this time around going to get these  
9 facts and not be popped on the rear side by saying, well, you  
10 didn't ask the right questions or you didn't make clear to the  
11 Court what you needed to have.

12           These are fundamental responsibilities of a plaintiff  
13 in any litigation, and to pretend that this is unheard of  
14 early in a case, for you to say what misrepresentations were  
15 made to you, who made them and how you relied, is simply  
16 treading water to try to avoid having to make those  
17 disclosures.

18           MR. CRONAN: Your Honor, may I be heard?

19           SPECIAL MASTER VANASKIE: Mr. Kass -- one at a time,  
20 but we'll hear from Mr. Cronan first.

21           MR. CRONAN: Sure, Your Honor.

22           To the comment about treading water, Your Honor,  
23 again, I go back to what we talked about earlier on in this  
24 hearing. Again, the fact sheet has agreed-upon requests with  
25 respect to the fraud, for example, which specifically asks

1 about statements, when they were made, who they were made by  
2 and further details along those lines. So it's not as if  
3 we're claiming that there's no entitlement to that  
4 information.

5 And, secondly, as Attorney Kass talked about earlier,  
6 the work product privilege -- the work product issue here is  
7 really a significant issue that ought to be considered.  
8 There's always the risk of invading that -- the work product  
9 concerns once we're dealing with contention requests. And it  
10 makes no sense in my view, Your Honor, to go towards that risk  
11 when we don't need to at this point, especially when we're in  
12 such an early stage and we haven't narrowed the issues down.

13 So those are just the two points that I wanted to  
14 raise.

15 SPECIAL MASTER VANASKIE: All right. Thank you.

16 Did you want to be heard, Mr. Kass?

17 MR. KASS: Yes, just very briefly.

18 Again, so I hear Ms. Davis' argument, but, again, so  
19 she's saying she needs to know what the information is. Okay.  
20 So the remedy is, if any remedy it is, it's a contention  
21 interrogatory. It's not a contention request for production.  
22 We're using the wrong vehicle to try and get to a conclusion.  
23 So I just really want to make that difference.

24 And the TPPs' position -- and this is based on the  
25 case law that we cited in our brief -- contention requests for

1 production are simply not allowed because they invade the  
2 attorney work product. It's a full stop, privilege.

3 Then, Your Honor, it seems to be saying, she's  
4 almost -- and then we're almost trying to -- Ms. Davis is  
5 almost trying to -- getting into, is there standing, not  
6 standing on it. That's an issue for a motion to dismiss.

7 Like -- like, we do -- you know, we do discovery and  
8 we do litigation in a former -- in a manner. Right? If she  
9 thinks there's not standing, if she thinks it's not correctly  
10 laid out in the complaint, well, you do a motion to dismiss.  
11 Right?

12 But now to -- I think we're sort of putting the cart  
13 before the horse.

14 I just wanted to flag that. That's all I have.

15 SPECIAL MASTER VANASKIE: All right. I'd like to  
16 talk about the final item that's at issue, the record  
17 retention policies that have been asked on page 23 of 2511-2.

18 Why would that be inappropriate, Mr. Cronan?

19 MR. CRONAN: So the request regarding the  
20 recordkeeping, we indicated that's a contention request,  
21 because we think the way -- the way it's phrased is  
22 inappropriate at this point. And I think it's something that  
23 we don't think is basically the kind of thing that would be  
24 asked for at this early stage in a fact sheet.

25 I mean, we've outlined our position on that before,

1 and I think it's -- to the extent we can answer it, you know,  
2 I think we could do that at a later point once we get more  
3 information. But at this point it's an early -- it's very  
4 preliminary.

5 SPECIAL MASTER VANASKIE: That seems to me to be a  
6 basic request part of core discovery, you know, you're finding  
7 out what might have been lost over time by ascertaining what  
8 retention policies existed. I'm having trouble understanding  
9 how that turns into a contention request.

10 MR. CRONAN: Your Honor, we would be open to  
11 revisiting the way it's phrased at this point, if that's  
12 helpful.

13 I think it's just -- this is our position, at least  
14 at this point, based on how this has been presented in this  
15 fact sheet.

16 MR. GEOPPINGER: Your Honor, may I --

17 SPECIAL MASTER VANASKIE: Yes.

18 MR. GEOPPINGER: -- say something on this one?

19 This one is in contention. It's highlighted in  
20 green.

21 I can tell you, it was -- you know, the plaintiffs --  
22 I haven't had a chance to talk with Mr. Cronan, specifically  
23 to him, about this. I don't think Mr. Kass and I talked about  
24 this. But it was deleted by the plaintiffs.

25 It could have been the subject maybe of more meet and

1 confer, but let me just tell you this. This is a request.  
2 And if it's not, I'll make sure -- double, triple check, make  
3 sure, this is a verbatim request to us, the defendants. This  
4 is in plaintiffs' request for production to the defendants,  
5 the wholesalers, I think the manufacturers too. This is one  
6 of their requests for production. We put it in here. These  
7 are -- you know, these are not individuals we're dealing with  
8 in this instance, these are companies. So we've included the  
9 same request that they've asked of us. So I think it's  
10 appropriate. And I'd -- probably, I think if the plaintiffs  
11 take a look at it a little closer, they're probably going to  
12 agree too.

13 MR. CRONAN: Your Honor --

14 SPECIAL MASTER VANASKIE: All right. Mr. Kass's  
15 camera came on, so --

16 MR. CRONAN: Go ahead. Go ahead, Zalman.

17 No, no. I was just going to say, Your Honor, we  
18 have --

19 Zalman, please go ahead. Please do.

20 MR. KASS: Well, I was just going to say again, Your  
21 Honor, we're definitely okay with looking at it again and  
22 speaking to the wholesaler defendants to see if something can  
23 be reached.

24 I'm not sure exactly sure which request for  
25 production it's from, since we -- so, again, like, I don't

1 know -- like, there are more factual information that I don't  
2 have right in front of me right now, and so sort of we  
3 haven't really -- you know, I'll be very honest with you, Your  
4 Honor, we've been meeting and conferring a lot with the  
5 wholesaler defendants, but there are just a lot of -- a lot of  
6 requests that we were going through, and the parties really  
7 haven't focused so much on that section, so it may make more  
8 sense for us to have another meet and confer. And maybe we  
9 can resolve it.

10 Like, you know, conceptually, if there are going to  
11 be document retention policies, yeah, we're not opposed to  
12 giving it to them. It's just, we need -- I think it's really  
13 a matter of figuring out how -- how to word the request.  
14 That's I believe where we are.

15 MR. GEOPPINGER: And presuming I'm correct, I think  
16 the plaintiffs after they look at their own requests are going  
17 to agree that the wording is pretty good since they wrote it.

18 MR. CRONAN: In fact, I agree. We will revisit that,  
19 Your Honor, if that's acceptable.

20 SPECIAL MASTER VANASKIE: I will ask that you revisit  
21 it and report back to me on that particular request within a  
22 few days. All right?

23 MR. GEOPPINGER: Sure.

24 MR. CRONAN: Certainly.

25 SPECIAL MASTER VANASKIE: It shouldn't take long to

1 do.

2 I don't know if we're interrupting your vacation,  
3 Mr. Kass, but I presume we are.

4 MR. KASS: Just a bit, but this was -- it was  
5 important, so...

6 SPECIAL MASTER VANASKIE: Okay. All right.

7 All right. I will get a decision out promptly on  
8 this.

9 Is there anything else you want to present to me  
10 today?

11 MR. GEOPPINGER: Nothing from the wholesaler  
12 defendants. And unless any of my other colleagues have  
13 something to weigh in, I would saying nothing from the  
14 defendants as a whole.

15 THE COURT: Mr. Cronin?

16 MR. HARKINS: Your Honor, briefly for the  
17 non-wholesaler defendants, nothing to add, just to make sure  
18 that -- and I think this is reflected on the record, that any  
19 decision as to deferring or allowing further discovery as  
20 appropriate would not just apply to the wholesaler defendants,  
21 but there are a certain number of requests in here that are  
22 applicable to the other defendants. I just want to make sure  
23 that that's incorporated into the order.

24 SPECIAL MASTER VANASKIE: Okay. Very well. Thank  
25 you.

1 Mr. Cronan, anything else?

2 MR. CRONAN: Thank you, Your Honor. Nothing on  
3 behalf of the TPPs, unless my colleagues have anything else to  
4 add. I'll open the floor.

5 SPECIAL MASTER VANASKIE: Ann Marie, I thank you for  
6 your patience with us today, because we sometimes talked over  
7 each other.

8 Hearing nothing else, we'll conclude for today. All  
9 right. Thank you all very much.

10 RESPONSE: Thank you, Your Honor.

11 (Proceedings concluded at 2:02 p.m.)

12 - - -

13 I certify that the foregoing is a correct transcript  
14 from the record of proceedings in the above-entitled matter.

15

16 /S/ Ann Marie Mitchell 25th day of January, 2024

17 Court Reporter/Transcriber Date

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